SUPREME COURT, U. S.

OCT 9 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 561

MARINE INSURANCE COMPANY, LTD.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY

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October 6, 1967.

INDEX

Table of Cases Cited

	PAGE
Cline v. *United States,* 214 F. Supp. 66 (D.C. Tenn., 1962)	2n
Otten v. *United States,* 210 F. Supp. 729	2
Rudd v. *United States,* 233 F. Supp. 730 (D.C. Ala., 1964)	2n
Slater v. *Keleket X-ray Corp.,* 172 F. Supp. 715	2n
U.S. v. *Aetna Cas. & Surety Co.,* 338 U.S. 366	2n
United States v. *Collins,* 349 F. 2d 863 (C.A. 2), cert. den., 383 U.S. 960	1, 2

Other Authorities Cited

18 U.S.C. 1708	2
28 U.S.C. 2680(b)	2

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United States v. *Collins*, A CASE BROUGHT UNDER CRIMINAL STATUTES, IS INAPPOSITE

Respondent, in its brief in opposition (at p. 8), mistakenly claims that *United States* v. *Collins*, 349 F. 2d 863 (C.A. 2), cert. den., 383 U.S. 960, is in point. There is no sound basis for such an assertion.

Although the package may have been mailed within the mail theft statute, the claim arises out of negligence involving an activity and function not immune to suit.

In *United States* v. *Collins* (24a), the Second Circuit was not concerned with the same question of law as here presented. There, *for the purposes of the criminal statute*, the Court held that Collins' desk was

a "mail route or other authorized depository for mail matter". 349 F. 2d at 866, citing 18 U.S.C. 1708. It is submitted that the criminal statute is broader than the Tort claims *exception* (cf. 28 U.S.C. 2680(b) and 18 U.S.C. 1708).[1]

Where a mail truck accident is involved,[2] the mere fact that mail is being carried does not preclude suit where the loss arises out of other than the fact that mail is aboard the negligent vehicle. The fact that mail may be involved is merely a coincident to the claim. *The placing of a postage stamp on an article, of itself, does not preclude all suit against the Government.*

For instance: it is submitted that if, in this very case, the Government authorities had succeeded in locating the package and then turned the package over to be "Exhibit A" against Collins in his trial, and then, after the trial, failed to return the package to plaintiff upon demand, suit would lie. *Otten* v. *United States,* 210 F. Supp. 729, *supra.*

Clearly must we carefully consider the entire scheme of the Tort Claims Act in applying any of its exceptions. Customs activity cannot be held to be immune

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[1] Or, to put it the other way the "Federal Tort Claims Act • • • a sweeping, comprehensive measure enacted in accordance with modern progressive trends to waive Governmental immunity • • • should receive a broad and liberal construction." *Slater* v. *Keleket X-ray Corp.,* 172 F. Supp. 715 at p. 717 (D.C. D. C., 1959) citing *U.S.* v. *Aetna Cas. & Surety Co.,* 338 U.S. 366, 383, i.e., the Act should be broadly construed while the exceptions thereto should be narrowly construed.

[2] e.g., *Rudd* v. *United States,* 233 F. Supp. 730 (D.C. Ala., 1964); *Cline* v. *United States,* 214 F. Supp. 66 (D.C. Tenn., 1962).

from suit just because Customs was also an authorized depository for the mail. That it was mail, was incidental. That the package was lost while Customs undertook to handle it is critical. We must distinguish protected activities and functions from vulnerable ones.

Conclusion

For the reasons recited above and in petitioner's moving brief, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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